



U.S. Citizenship
and Immigration
Services

File: SRC 03 054 53161 Office: TEXAS SERVICE CENTER Date: 007 004

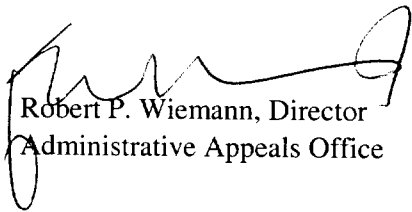
IN RE: Petitioner:
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its general manager as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a limited liability company organized in the State of Florida, and is engaged in the import and export business. The petitioner is also engaged in the distribution of industrial equipment. The petitioner claims that it is the affiliate of Electronica de Fabricas Factronics, C.A., located in Caracas, Venezuela. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director's basis for the denial was erroneously based on the small number of staff employed by the U.S. entity. In addition, counsel for the petitioner contends that the U.S. entity intends to hire additional employees in the future, thereby solidifying the need for the beneficiary's managerial position. In support of this assertion, the petitioner submits a brief and additional evidence.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (a) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (b) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (c) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (d) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and
- (e) Evidence of the financial status of the United States operation.

The primary issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the initial petition, counsel for the petitioner stated that beneficiary's duties "verify that she was employed with the foreign company in and [sic] Executive or Supervisory capacity," and described the beneficiary's job duties as follows:

[The beneficiary] is responsible for supervising the administrative functions, marketing activities, and for the overall performance of the company. She has the discretion over all full-time, long-term personnel decisions for the company, and directly supervises their activities. [She] manage[s] full-time employees, as well as negotiates contracts on behalf of the corporation and deal[s] with the U.S. supplier of goods. She oversees the day-to-day operations of the company. The persons that she oversees manage all daily activities of the company, and [the beneficiary's] functions are purely managerial.

In addition to the above responsibilities, when other employees are to be hired by [the petitioner, the beneficiary] directly supervises and has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, she functions at a senior level within the organizational hierarchy or with respect

to the function managed. [The beneficiary] also exercises discretion over the day-to-day operations of the activity or function for which she has authority.

On December 23, 2002, the director requested additional evidence establishing that the beneficiary was employed in a capacity that was primarily managerial or executive in nature. Additionally, the director requested specific documentation for the record, including:

- (1) Copies of the petitioner's state quarterly tax returns for the previous two quarters;
- (2) Copies of the petitioner's annual federal unemployment tax returns;
- (3) A description of the duties and educational backgrounds of the other employees of the U.S. entity;
- (4) An explanation regarding how the beneficiary would abstain from performing the day-to-day operations of the business;
- (5) A copy of the petitioner's 2001 federal tax return; and
- (6) Evidence that the U.S. entity had been doing for the previous year.

On January 7, 2003, the petitioner, through counsel, submitted a detailed response accompanied by the documentation requested by the director. Counsel's response, which provided a detailed overview of the beneficiary's duties, also included a breakdown of the percentages of time the beneficiary spent working on each task. Further, counsel provided a description of the titles and duties of the beneficiary's co-workers, as well as an explanation of their educational backgrounds.

On January 21, 2003, the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary would refrain from performing everyday tasks, thereby preventing a finding that she would be employed in a capacity that is primarily managerial or executive.

On appeal, counsel for the petitioner asserts that the director's decision was erroneously based on the fact that the company employs only three other employees.

Upon review, counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In this case, counsel's primary allegation is that the director applied an erroneous standard in determining the nature of the beneficiary's position. Specifically, counsel alleges that the director

relied solely on the small number of staff employed by the U.S. entity as a means for determining that the beneficiary's position was not primarily managerial or executive. The AAO disagrees.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, contrary to counsel's allegations, it is appropriate for Citizenship and Immigration Services (CIS) to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

The AAO notes that counsel relies heavily on *Mars Jewelers, Inc. v. Immigration and Naturalizations Services*, 702 F. Supp. 1570 (N.D. Ga. 1988), in support of the premise that the director erred in examining the size of the petitioning entity in reaching her decision. However, counsel fails to recognize or discuss the subsequent holding in *Systronics*, which permits CIS to examine an entity's size in relation to the reasonable needs of the entity. In addition, counsel relies on the language of the case as opposed to the central issue decided, which was whether the 1983 or 1987 regulations were applicable to the AAO's review of the director's decision. Consequently, counsel's reliance on *Mars Jewelers* is misplaced and will not be considered for purposes of this analysis. Furthermore, counsel also refers to *Matter of Harrison Pacific, Inc.*, an unpublished AAO decision from 1994. Since this decision has not been published, it is not binding precedent and therefore will not be considered in rendering this decision.

In this case, counsel for the petitioner initially alleges that the beneficiary's duties are primarily managerial or executive in nature. There are two problems with counsel's assertion. First, in light of the above premise, counsel fails to provide sufficient evidence that the beneficiary will not engage in any of the U.S. entity's day-to-day activities. Although counsel alleges that the director's examination of the small staff employed by the petitioner is an irrelevant factor, he fails to acknowledge that the evidence in the record warrants such an examination. Specifically, the record states that the U.S. entity employs, in addition to the beneficiary, an executive assistant, a warehouse and operations manager, and a warehouse and traffic assistant. Yet, the organizational chart provided for the U.S. entity, and affirmed by counsel's response to the request for evidence, confirms that the U.S. entity employs no sales manager or sales persons. The petitioner's documentation indicates that the beneficiary herself, on numerous occasions, personally acknowledged the receipt and shipment of various goods as evidenced by her signature on purchase orders and invoices. Clearly, the record reflects that the beneficiary is engaging in day-to-day tasks that are non-managerial in nature.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the

reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are reasonable in light of its overall purpose and stage of development. In the present matter, counsel for the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel for the petitioner simultaneously alleges on appeal that the beneficiary's position complies with the regulatory definition of executive capacity. In his brief, counsel restates the definition of executive capacity, and claims that "the beneficiary directs the management of the organization, establishes goals and policies for the organization, exercises wide latitude in discretionary decision-making, [and] is supervised by the Board of Directors." Counsel continues this line of reasoning by stating that CIS cannot argue that the petitioning entity has too few employees as a basis for denial, since the number of employees is not relevant to an analysis of executive capacity.

Once again, the AAO disagrees with counsel's position. As previously discussed, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). As evidenced by the quote provided in the previous paragraph, counsel has failed to extend his discussion of the beneficiary's employment in an executive capacity beyond the standard definitions. Additionally, the first mention of the beneficiary's alleged employment in an executive capacity is made on appeal. In fact, counsel alleges for the first time that the beneficiary's position could be *either* managerial *or* executive. Furthermore, counsel alleges for the first time on appeal that the beneficiary may even qualify as a function manager. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity. Additionally, the petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities on appeal. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Finally, counsel for the petitioner indicates that it plans to hire additional managers and employees in the future, and relies on this business plan as a basis to justify the employment of the beneficiary in a managerial capacity. However, as stated above, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*,

17 I&N Dec. 248 (Reg. Comm. 1978). Furthermore, 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily executive or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3).

Beyond the decision of the director, the AAO notes that a significant number of documents submitted in support of the petition are in Spanish and are not accompanied by English translations. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether those particular documents support the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.